Supreme Court, U. S.
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No. 79-277

In the
Supreme Court of the United States
OCTOBER TERM, 1979

BEN LEE TUTT, III,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ~~SUPREME COURT OF~~ TENNESSEE

CHARLES GALBREATH
MARK A. SCHNEIDER
GALBREATH, SCHNEIDER & ZANETIS, P.C.
201 Second Avenue, North
Nashville, Tennessee 37201
Attorneys for the Petitioner

The Scheffer Press, Inc.—(312) 263-6850

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vs.

STATE OF TENNESSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

May It Please The Court:

The Petitioner, Ben Lee Tutt, III, by his attorneys, herewith files his Petition for Writ of Certiorari, requesting this Court to review the decision affirming his conviction for possession of a controlled substance (marijuana) for the purpose of resale. This conviction was affirmed by the Tennessee Court of Criminal Appeals in an opinion released on November 9, 1978. The Tennessee Supreme Court denied the Petition for Writ of Certiorari which was subsequently filed, by order dated March 5, 1979. A copy of the opinion from the Tennessee Court of Criminal Appeals and the Memorandum on Petition for Writ of Certiorari from the Tennessee Supreme Court are appended hereto. On June 1, 1979, upon consideration of this application of counsel for the Petitioner, the time for filing this Petition for Writ of Certiorari was extended to and includ-

ing August 2, 1979. A copy of this Order, signed by Justice Stewart, is also appended hereto.

The jurisdiction of this Court is sought pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

This Petition presents one question for review: Whether the information supplied by a confidential informant, whose reliability was not vouched for, can supply sufficient probable cause for the issuance of a search warrant, when the affiant police officer has corroborated only innocent details of the allegations made by the confidential informant against the Defendant.

CONSTITUTIONAL PROVISIONS RELIED UPON

The Petitioner relies upon the Fourth and Fourteenth Amendments to the United States Constitution. The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment reads as follows, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The indictment returned by the Shelby County Grand Jury on April 20, 1976, charged that on March 17, 1976, the Defendant Ben Lee Tutt, III, did unlawfully and feloniously possess with intent to sell a controlled substance, to wit, marijuana. On December 1, 1976, the Defendant was arraigned and entered a plea of not guilty. On January 13, 1977, the Defendant filed his motion to suppress which was heard on January 18, 1977, and on January 20, 1977, overruled. On November 17, 1977, after a trial by jury, the Defendant was found guilty as charged in the indictment and in accordance with the jury verdict, sentenced to serve not less than one (1) nor more than five (5) years at the State Penitentiary with the actual place of confinement to be the Shelby County Penal Farm. Defendant's motion for a new trial was seasonably filed and after oral argument on January 27, 1978, overruled. An appeal was prayed and granted and the Bill of Exceptions consisting of the search warrant issued in this case was filed within ninety (90) days allowed by the Court. As indicated above, the Court of Criminal Appeals affirmed the judgment of the trial court and the Tennessee Supreme Court denied Petitioner's request for Certiorari.

The only facts relied upon by the defendant in his appeal are uncontroverted and are set forth in his Bill of Exceptions as Exhibit 1 to the Record as identified and made a part of the Record by the trial judge. The facts set forth in Exhibit 1 are in the form of an af-

fidavit for a search warrant signed and sworn to by C. F. Johnson, Deputy, who alleged that on March 16, 1976, the day before the application for the warrant was made, the deputy had talked with an informant of Memphis who related that within the past five days the informant had been inside the residence of the Defendant and had seen the Defendant storing and selling marijuana. The informant described the residence as a yellow wood duplex, stated that the north side where the Defendant lived had a large glass door but no house number over the door, but that the house number 250 was above the door of the south unit of the duplex. The informant further stated that the Defendant was a student of some trade school. The affidavit does not state that the informant gave a physical description of the Defendant, but the application for the warrant gives a physical description and approximate age of the Defendant.

The affidavit of the deputy further recited that the same date the information was received from the informant the deputy drove to 250 South Watkins and verified the location and description of the residence. He also checked with the local utility company and found that the utilities for the building at 250 South Watkins were listed in the name of the Defendant and another person. The next day the deputy called several trade schools in the Memphis area and verified that the Defendant was enrolled in State Technical Institute.

On March 17, 1976 at 10:43 A.M., the warrant was issued by Judge Stinson and executed by the deputy the same day. The deputy's return indicated he seized two (2) sets of scales, one (1) utility bill, a paper bag containing "Marij," and one (1) brown leather bag. Judgment on the search warrant was made April 25, 1976.

ARGUMENT

The sole question presented in this appeal is the validity of a search warrant issued by a General Sessions Judge of Shelby County on March 17, 1976. The Defendant filed his motion to suppress alleging the warrant was invalid on its face. No evidence was adduced at the hearing, and after oral arguments by counsel for Defendant and the State, the motion was denied.

An examination of the warrant reveals that the supporting affidavit by Deputy C. F. Johnson was based upon hearsay information from an unnamed informant who it was alleged had seen the Defendant Ben Lee Tutt, III, "storing and selling marijuana" in a residence the exterior of which was described with some particularity. The officer's affidavit gave a physical description of the defendant presumably obtained from the informant, a verification by the officer of the description of the residence, confirmed that Defendant was one of two users of utilities at that location and was registered at a local trade school as the informant had alleged.

At the suppression hearing, the State conceded the officer had not sworn to the reliability of his informant but argued his reliability was established by two facts verified by the officer-affiant, namely, that the Defendant was a resident of the premises to be searched and that he attended a local trade school. Under the State's theory, the information furnished by a first-time informant may be sufficiently corroborated to establish his credibility and thus validate the search warrant. It is the contention of the Defendant that the

warrant in this case lacks any corroboration of criminal activity by the Defendant and thus affords no basis for believing the unsworn informant's assertion that the Defendant was engaged in criminal activity. For this reason, the warrant fails to meet the two-pronged test established by *Aguilar* v. *Texas*, 1964) 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723, reaffirmed in *Spineli* v. *United States*, (1969) 393 U.S. 410, 89 S.Ct. 584. 21 L. Ed. 2d 637, and explicated again in *United States* v. *Harris*, (1971) 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723.

In giving substance and meaning to the Fourth Amendment prohibition against unreasonable searches and seizures, the courts have required that before searches of citizens and their homes be conducted by police officers warrants be obtained absent certain exigent circumstances. Thus, "the inferences from the facts which lead to the complaint must be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, (1958) 333 U.S. 10, 13-14, 68 S. Ct. 367, 92 L.Ed. 463. The magistrate's judgment must be based upon information made available to him by the officer obtaining the warrant, usually in the form of an affidavit contained in or attached to the warrant. The magistrate's judgment may be questioned if the affidavit on its face fails to contain sufficient information to establish probable cause to issue the warrant. Hearsay information in the affidavit is sufficient, *Jones* v. *United States*, (1960) 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2nd 697, but where the affidavit contains hearsay certain rules must be applied before the unsworn hearsay information can be credited by the magistrate or,

as stated in Jones, "there must be a substantial basis" for crediting hearsay.

In *Aguilar, supra,* the Court noted that while a reviewing tribunal would pay substantial deference to a judicial determinaton of probable cause, it must still insist that the magistrate perform his "neutral and detached" function and not serve merely as a rubber stamp for the police, (378 U.S. at p. 111). The two-pronged test of *Aguilar* required the affidavit to contain (1) underlying facts and circumstances which the informant concluded criminal activity was being carried on or that the goods to be seized were where they were purported to be and (2) underlying facts or circumstances from which the affiant could conclude [a] the informant was reliable or [b] his information credible. Since the affidavit in the instant case recited that the informant had seen marijuana being stored and sold at the Defendant's house, the first prong of the *Aguilar* test had been establised and need not be considered further. The question remains whether the affidavit sufficiently established the credibility of the informant or the reliability of his information. Many writers describe these tests as the two "spurs" of the second "prong" of *Aguilar*. Since the spurs are described in the disjunctive, proof of either spur will satisfy the requirement of the prong.

The classic method of satisfying the [a] spur of the reliability-credibility prong is the recitation that the informant is a reliable person who has given reliable information in the past leading to arrests and/or convictions or similar recitations. An affidavit failing to establish the known reliability of the informer may satisfy the [b] spur of the Aguilar test by submitting to the magistrate facts independently obtained by the

affiant-officer which will corroborate the information supplied by the informant and thus establish his credibility in the present instance if not his general reliability as a citizen. *Spinelli* v. *United States, supra,* held that a deficient "credible" informant's report may be corroborated by independent police investigation to assure that the informant is not "fabricating his report out of whole cloth". The affidavit in *Spinelli,* though replete with suggestive details contained in seventeen pages of information obtained by the investigators, was determined to be insufficient to establish evidence of criminal activity. Even though "the affiant swore that his confidant was 'reliable' he offered the magistrate no reason in support of this conclusion." (393 U.S. at P. 416)

In *United States* v. *Harris, supra,* decided by a deeply divided court, the plurality found the first time informant's "veracity" was bolstered by additional facts established by the officers in their investigation. The affidavit alleged that Harris had a reputation as a whiskey dealer for four years. The plurality of the Court felt that standing alone this fact of reputation would not be sufficient to establish the reliability of the informant, but it would not be irrelevant where supported by other information. This reputation information was supported by the officer's statement that illicit whiskey had been located in an abandoned house under Harris' control. Perhaps of most significance to the plurality was the fact that the informant had admitted to the officer-affiant that he had on many occasions bought untaxed whiskey from Harris. The plurality felt that such a hearsay statement against penal interest constituted a strong basis for believing that the informant was being truthful.

The decisions have often confused the role of the officer's independent investigation in corroborating the hearsay informant's tip. The officer's affidavit is often vague about how the informant came by the information he relayed to the officer because of careless drafting or because that officer feels that being too specific might reveal the identity of his source. In such cases the officer must supply enough detail to convince the magistrate that the informant saw or heard what he reported he saw or heard, as in *Draper* v. *United States,* (1969) 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327, where the informant's report was verified by government agents when Draper stepped off the train in Denver.

To meet the *Aguilar-Spinelli-Harris two-pronged test* then there must be an explicit showing that the informant saw or heard criminal activity or contraband or there must be enought details recited to indicate that he *must* have seen or heard such and that he should be believed under the circumstances. The informant's details cannot supply the independent corroboration necassary to support either his reliability or his credibility.

In connection with the showing of veracity, an eminent jurist has stated:

> "There is an inverse relationship between the initial showing of 'veracity' and the required 'verification': The more you have, the less you need; the less you have the more you need," Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer,* 25 Mercer L. Rev. 741, 779 (1974).

Many cases have held one or both prongs of the Aguilar test were not met. In *United States* v. *Larkin,*

510 F. 2d 13 (9th Cir., 1974), the informant said a described car would travel a certain route and would carry narcotics. The officers verified this information but the tip was held to be insufficient. In *United States* v. *Pierce,* 356 F.Supp. 756 (E.D. Pa., 1973), an anonymous call that Defendant was dealing in counterfeit bills and driving a described car was held to be insufficient even though the officers verified the information and conducted a surveillance of Defendant but observed no incriminating circumstances. In *People* v. *Williams,* 186 Colo. 72, 525 P. 2d 463 (1974), an anonymus informant related that the Defendant had gone to Texas to get heroin and would return by air at a certain time to be met by a certain person. Although the police verified the Defendant's return and meeting with the other person, the information was held to be insufficient. "The corroborating facts gather by the officers prior to the arrest confirmed only innocent incidents of the tip." (525 P. 2d at p. 465). The informant in *Carson* v. *State,* 326, N.E. 2d 624 (Ind. 1975), said that Defendant would leave home at a certain time and would have heroin with him, but this information from a "confidential and reliable informant" though verified by the officers was held to be insufficient. Many of the courts note in evaluating these tips and subsequent investigation of the officers that the activities of the Defendant as verified by the officers and recited in the affidavit are often not inconsistant with those of an innocent person. Thus, *Spinelli, supra,* the mere possession of two phones does not lead to the inevitable conclusion that a bookmaking operation is taking place. In *Waugh* v. *State,* 338 A. 2d 268 (Mr., 1975), an informant advised officers that a certain person would be shipping marijuana by air in a described suitcase.

A suitcase matching this description was found at the airport. It smelled of talcum powder which testimony revealed is often used to cover the smell of marijuana. The Court held that the location of the described suitcase and the independent fact that it smelled of talcum was not sufficient case for the search since there was nothing unusual about the suitcase of innocent people containing talcum.

In *People* v. *Gallegos,* 397 P.2d 174, 41 Cal. Rep. 590 (1964), the officers staked out a house shown by an untested tipster and confirmed the description of the Defendant's car. A subsequent search by the officers was held illegal because the information gathered by the officers must show the Defendant is "presently engaged in illegal conduct." In *People* v. *Fein,* 484 P. 2d 583, 94 Cal. Rep. 607, (1971), a similar fact situation led the Court to conclude:

> in order for corroboration to be adequate, it must pertain to Defendant's alleged criminal activity; accuracy of information regarding the suspect generally is insufficient.

Radowick v. *State,* 224 S.2d 346 (Ga. App., 1978) held that explicit and detailed information from an anonymous informant about a moving vehicle where the officers spotted an identical vehicle with the same occupants did not justify the detention of the occupants and a search of the vehicle:

> An unknown informer's tip, even when corroborated by innocent data of the suspect is insufficient to raise suspicion to the level of probable cause.

State v. *Mabrey,* 321 S.E. 2d 461 (Ga. App. 1976) involved a first time informant who gave information

against Defendant which possibly was against his penal interest The Court after studying the *Harris* rationale found that the officer's "corroboration" went not to descriptive details of the appellant's criminal activity but rather to the mere description of a suspect and thus the affidavit to the warrant did not support a finding of probable cause. In *People* v. *Wirchansky,* 391 N.Y.S. 2d 70, 41 N.E. 2d 130 (1976), the police in checking out a tip that the Defendant was picking up gambling paraphanelia at a specified apartment house, confirmed that Defendant entered the premises on two successive days and remained for only a few minutes. The Court held that the tip failed to meet the "underlying circumstances" prong of the *Aguilar* test and the information supplied by the police was not sufficient to bolster the tip or show probable cause." In answer to the argument that the daily stops by the Defendant at the location described

> the detected pattern, being only the superficial part of a sequence does not provide probable cause for arrest if the same sketchy pattern occurs just as frequently or even more frequently in innocent transactions.

In *People* v. *Cadby,* 403 N.Y.S. 2d 940 (1978) the police, using a map prepared by a previously unknown tipster, placed Defendant's premises under surveillance. Although they observed no suspicious activity, they arrested the Defendant when he was leaving the premises. The Court said:

> The sole verification consisted of comparing the physical description of the house where Cohen claimed the drugs were located with the address provided by the phone company and in the con-

> currance of the name Terry as one of the suppliers of the drugs and as the owner of the telephone Cohen was to call. The verification of these details is not sufficient to raise even an uncontradicted story given by an informant to the level of probable cause. Such a finding requires more than an observation of innocent detail or conduct.

The Court cited *People* v. *Conado,* 292 N.Y.S. 2d 648, 239 N.E. 2d 526, (observation of Defendants exchanging sealed envelopes in a car is insufficient verification of tip) and *People* v. *Horowitz* 286 N.Y.S. 2d 473, 233 N.E. 2d 435 (observation of an individual meeting a description of the carrier of stolen bonds is insufficient verification).

In *Commonwealth* v. *Hagen,* 366 A. 2d 318 (Pa. Super., 1976), the information passed by the tipster failed to meet the "underlying circumstance" test of *Aguilar* and the confirmation by police that Defendant and another person were living where the tipster said they were was not sufficient information to establish the reliability of the informant.

Detailed information supplied by an informant, when corrroborated, may prove then that the informant saw what he said he saw or that his information is credible or both as the exigencies of the situation may require. Since in the case *sub judice,* the informant stated that he had been inside the Defendant's residence where he had seen marijuana stored and sold, no further details of the visit were given. Although the warrant contains a description of the exterior of the premises, the magistrate is not given a description of the interior of the house or told precisely where the marijuana is stored, or in what manner it is packaged, or any other fact

which would indicate that the informant had ever seen the interior of the Defendant's house. The bare assertion by the informant that he had been inside the house and seen marijuana stored and sold is sufficient if the officer's affidavit presents sufficient believable information to establish his informer's credibility. This the officers sought to do by verifying the description of the exterior of the premises and by verifying that the Defendant was a student at a local trade school. Even the description of the Defendant is unverified by the officer. There was no allegation made that the Defendant had a reputation as a drug dealer or consorted with known dealers, that large numbers of people were seen entering his premises and shortly leaving, that Defendant was known to have made marijuana sales to others, that Defendant frequently made trips to well-known places where marijuana was bought wholesale, that Defendant had ever offered by buy or sell marijuana to or from anyone, or had ever spoken of marijuana to anyone, that Defendant was known or believed to be connected to marijuana sales or use in any way. Rather, the corroborating facts supplied by the officer-affiant to the magistrate related to perfectly innocent law-abiding activities on the part of the Defendant, namely, that he lived where the informer said he lived and that he went to a local trade school as the informer said he did, nothing more.

The prohibition of the Fourth Amendment against unreasonable searches and seizures will be meaningless if the courts allow unsworn hearsay allegations by people whose reputation or credibility is not revealed to a magistrate to serve as the basis for a police search of citizens' homes. To so hold would allow the police to substitute their assessment of the informant's re-

liability for that of the neutral and detached magistrate.

Though the rule may be relaxed in cases involving vehicle searches due to exigent circumstances, the home is the last bastion of the individual against the encoachment of the government.

To put the matter more concretely, if the State's contention is upheld, an officer might appear before a magistrate and obtain a warrant based upon an affidavit reciting that an unnamed informant had told the officer that he had seen Mr. X storing and selling marijuana in his home, that the house was a white brick house with a brown roof at 727 Summerly Drive in Nashville, that the resident of that house was an attorney in Nashville and, further, that the officer had verified there was such a house at the location described, that the utility company's records listed Mr. X as a customer at that location and that Mr. X was an attorney with an office on Second Avenue, North in Nashville. Armed with such a warrant, the officers could demand that Mr. X admit them and allow them to search his house and if no one is at home when they arrive, they may kick down his door and conduct a search in his absence.

The corroborating information required to establish the credibility of an informant must be information tending to show criminal activity on the part of the accused, otherwise, the citizen will become a prey to disgruntled employees, jilted lovers, jealous spouses, suspicious neighbors or just plain cranks. The quality of informaton must rise above that which "would easily have been obtained from an offhand remark heard at a neighborhood bar." *Spinelli, supra.* The mere fact

that a citizen exists, lives where he lives and has an occupation cannot lend credibility to a police informant whose very future and freedom may be determined by the number of citizens he informs on. Many of these police informants have charges pending against them and it is to their advantage to range far and wide to enmesh friends, neighbors, acquaintances or strangers in their web.

The courts in interpreting the Constitution and particularly the Fourth Amendment have rightly been concerned with striking a balance against unjust intrusions of the police into their homes and against their persons and the justifiable concerns of society in the suppression of crime and the apprehension of criminals. Many of the cases arise because the police officers do not do their homework, either through ignorance, laziness or more probably because of a lack of manpower. The remedy for the shortcomings lies in a concerted effort to upgrade the quality of police investigations and not in the relaxation of constitutional guarantees to the citizens. In this case a more complete investigation on the part of the officer could have satisfied a neutral and detached judiciary that the informant was indeed credibile in his assertion of criminal activites on the part of the defendant if such activities were taking place. If the Court accepts the warrant presented here as a valid warrant, the standard of probable cause will have fallen so low that henceforth no citizen of this State will be immune from police searches.

CONCLUSION

For the reasons set out above, the Petition respectfully requests this Court to grant the Writ of Certiorari and reverse his conviction, remanding this matter to the trial court for a new trial.

Respectfully submitted,

CHARLES GALBREATH
MARK A. SCHNEIDER
GALBREATH, SCHNEIDER & ZANETIS, P.C.
201 Second Avenue, North
Nashville, Tennessee 37201
Attorneys for the Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent by U.S. Mail, postage prepaid, to the Hon. Robert A. Grunow, Assistant Attorney General, State of Tennessee, this 25th day of July, 1979.

/s/ Mark A. Schneider
Mark A. Schneider

APPENDIX

In The
COURT OF CRIMINAL APPEALS OF TENNESSEE
Jackson, September Session, 1978

BEN LEE TUTT, III,

Appellant,

vs.

STATE OF TENNESSEE,

Appellee.

NO. 175
SHELBY COUNTY

HON. WILLIAM H. WILLIAMS, JUDGE
(Unlawful Possession of a
Controlled Substance w/i to Sell)

FOR THE APPELLANT:
Edward G. Thompson
100 N. Main Building
Memphis, Tennessee

FOR THE APPELLEE:
William M. Leech, Jr.
State Attorney General
Nashville, Tennessee
Robert A. Grunow
Assistant State Attorney General
Nashville, Tennessee
Karen S. Neal
Research Assistant
State Attorney General's Office
Nashville, Tennessee

James F. Arthur, III
Asst. District Attorney General
Memphis, Tennessee

OPINION FILED: Nov. 9, 1978

AFFIRMED

John K. Byers
Judge

OPINION

The appellant was convicted of unlawful possession of marihuana with the intent to sell the same and sentenced to serve from one (1) to five (5) years.

The appellant says the trial court erred in not suppressing the evidence obtained in the search because the affidavit upon which the search warrant was issued was inadequate to support a finding of probable cause.

The judgment is affirmed.

The appellant's contention is based upon a claim the unknown informant, upon whose information the affidavit was made, is not shown in the affidavit to be reliable or that the information given by the informant was credible or reliable.

The affidavit shows the affiant received information in which the informant told him he (the informant) had been upon the premises of the appellant within five (5) days of giving the information, and that he (the informant) had seen the appellant storing and selling marihuana. The informant described the residence as being a yellow wood duplex and said the appellant lived on the north side thereof. The informant further described the portion of the duplex in which the appellant lived as having a large glass door with a no house number above

the door. The informant told the affiant the appellant was a student at a trade school.

The affiant, in order to verify the information which he had received, drove to the place described; and he observed the description of the residence was accurately given by the informant.

The affiant checked with the utility department and found the utilities were in the name of the appellant and further checking revealed the appellant was a student at the State Technical Institute.

The appellant says the affidavit in this case is deficient because there is nothing in the affidavit to show the informant's reliability or, in the alternative, the credibility of the information which he gave. Appellant concedes there are sufficient facts and circumstances shown from which the existence of criminal activity could reasonably be found to exist or the unlawful substance could reasonably be found to exist at the place stated.

The appellant insists the reliability of the informant is not sufficiently established to allow a neutral and detached magistrate to find probable cause as required by *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli* v. *United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969); and *United States* v. *Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971).

The appellant argues the affidavit is weakened because the informant, apparently a first time informant, is not shown to have previously given reliable information to the police. He claims the action of the affiant in corroborating the information as to the description of the premises, the correctness of the appellant's living in this residence and his pursuit of studies in a local trade school is insufficient

to corroborate the informant's tip of common activity and thus falls short. The appellant, in our view, reads more into *Aguilar, Spinelli* and *Harris* than was said by the United States Supreme Court.

As conceded by the appellant, there was a sufficient underlying basis to establish probable cause that criminal activity was taking place at the location described if the affidavit showed sufficient information for the issuing officer to believe the informant was reliable and the information by him was credible. Where there is no showing the informant has previously given reliable information, the credibility of the informant may be sufficiently established by a showing that a substantial part of the information is reliable even though the affiant is unable to show the ultimate fact of the crime. See *United States* v. *Branch,* 565 F.2d 274 (4th Cir. 1977), and *United States* v. *Garrett,* 565 F.2d 1065 (9th Cir. 1977), cert. den., ... U.S ...., 98 S.Ct. 1620 (1978).

A search warrant may issue when the facts and circumstances related would warrant a man of reasonable caution to believe an offense has been committed. *Berger* v. *State of New York,* 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). The existence of probability rather than a prima facie showing is all that is required. *Beck* v. *Ohio,* 479 U.S. 89, 85 S.Ct. 223, 13 L.Ed2d 142 (1964)

In this case, the affiant was able to verify that the appellant lived at the residence described by the informant and that he was a student as the informant said. We are of the opinion this verifies a substantial part of the informant's information sufficiently for a neutral and detached officer to find probable cause to issue the warrant. We think this affidavit when given a common sense and realistic view sufficiently satisfies the probable cause requirements and satisfies the commands of the Fourth Amendment. See *United States* v. *Ventresca,* 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

The evidence was admissible and the verdict is supported by the evidence.

/s/ John K. Byers,
John K. Byers, Judge

CONCUR:

/s/ Robert K. Dwyer,
Robert K. Dwyer, Judge

/s/ Joe D. Duncan
Joe D. Duncan, Judge

In The Supreme Court Of Tennessee
At Jackson

BEN LEE TUTT, III
Petitioner

vs.

STATE OF TENNESSEE
Respondent

SHELBY CRIMINAL
NO. 175

Memorandum On Petition For Writ Of Certiorari
(Filed March 5, 1979)

Upon consideration of the petition for the writ of certiorari, the assignments of error and brief, and the brief of the respondents, this Court is of the opinion the writ should be denied, with concurrence in the result only.

PER CURIAM

Supreme Court of the United States

NO. A-1047

BEN LEE TUTT, III,

Petitioner,

v.

TENNESSEE

Order Extending Time To File Petition For Writ Of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 2, 1979.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 1st day
of June, 1979.